WILEY, REIN & FIELDING

1776 K STREET, N. W.
WASHINGTON, D. C. 20006
(202) 429-7000

MAY 24 1996

May 24, 1996

WRITER'S DIRECT DIAL NUMBER
(202) 828-4901

FACSIMILE
(202) 429-7049

William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Reply Comments of Viacom Inc.
Implementation of Section 505 of the Telecommunications Act of 1996 (CS Docket No. 96-40)

Dear Mr. Caton:

By its attorneys, Viacom Inc. ("Viacom") hereby submits for filing its reply comments in the above-referenced proceeding. This submission consists of the original comments and four copies.

Please date-stamp the attached duplicate upon receipt and return it to us via the messenger for our records.

Should any questions arise concerning this matter, kindly contact the undersigned.

Respectfully submitted,

Rosemary C. Harold

Enclosures

024

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY [illegible] 1996

In the Matter of	)	
	)	
Implementation of Section 505 of	)	
the Telecommunications Act of 1996	)	CS Docket No. 96-40
	)	
Scrambling of Sexually Explicit	)	
Adult Video Programming	)	

REPLY COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom") hereby submits its reply to comments filed in connection with the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding implementing Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act").[1] Viacom's reply comments are limited to the "appropriate definition" of the video programming channels subject to Congress' call for full video and audio scrambling (or, in the alternative, special "safe harbor hours" blocking) designed to protect children from exposure to "sexually explicit adult programming" or "other indecent" material.[2]

---

[1] Order and Notice of Proposed Rulemaking, CS Docket No. 96-40, FCC 96-84 (released March 5, 1996). Viacom, a diversified entertainment and communications company, has substantial programming and related interests that might be directly affected by the implementing rules established under Section 505.

[2] Notice at ¶ 9; 47 U.S.C. § 641 (Section 505 as codified). Although Section 505 refers to "a channel" subject to its restrictions, the record in this proceeding demonstrates that the Commission and all commenters understand the term to mean what is commonly known as a "program service" within the industry. The two terms are used interchangeably throughout these comments.

By its terms, Section 505 unambiguously applies only to those program services "primarily dedicated" to the provision of sexually-oriented programming.[3] Viacom agrees with the Commission that "the statute is clear regarding what channels Section [505] applies to."[4] Nevertheless, Viacom also concurs with Time Warner that multichannel video programming distributors ("MVPDs") would benefit from further clarification that will unambiguously confine Section 505 scrambling and blocking obligations to only the specific types of program services that Congress has targeted.[5]

The clarification is warranted by the Commission's tentative decision to "rely on the good faith judgment" of MVPDs in determining whether a particular program service falls within the Section 505 mandate. Congress plainly did not intend for

---

[3] Section 505, codified within the Communications Act of 1934 as 47 U.S.C. § 641(a), requires that

> [i]n providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

Viacom notes that the constitutionality of Section 505 is in serious question and its implementation is currently suspended by court order. Playboy Enterprises Group Inc. v. United States, C.A. No. 96-94/96-107 (D.Del. March 7, 1996). These reply comments are limited to the implementation proposals put forth in the Notice. Viacom reserves the right to address the constitutional issues raised by Section 505 at a later date.

[4] Notice at ¶ 6; see also Notice at ¶ 9.

[5] Comments of Time Warner Cable and Home Box Office, CS Docket No. 96-40, at 3-4 (filed Apr. 26, 1995) ("Time Warner Comments").

broad-based program services that offer a wide variety of programming to be subjected to special scrambling or blocking requirements under the provision. Nor did lawmakers intend for Section 505 to apply to program services that, while programmed for a narrower segment of the audience or with a narrower type of programming, are not primarily devoted to sexually-oriented adult fare. Viacom therefore joins Time Warner in calling on the Commission to make clear that the program services subject to Section 505 are only those channels that predominantly program "indecent" material as defined under the FCC rules.[6]

Nothing in the legislative history or statutory language of Section 505 indicates that Congress ever intended Section 505 to extend beyond channels that predominantly provide indecent programs. Indeed, the sparse legislative history of Section 505 reveals only that the sponsor of the provision pointed to the "Playboy" and "Spice" channels as illustrative examples.[7] These are services whose entire focus is on providing sexually-oriented material. The contrast is obvious between them and Showtime or similar program services that cater to a wide audience with varied tastes

---

[6] Time Warner Comments at 3-4. Viacom also supports the Commission's decision to construe the phrase "sexually explicit adult programming" as a "subset" of indecency for the purpose of identifying programs that must be scrambled or blocked on the channels subject to Section 505. Notice at ¶¶ 6, 9.

[7] See Comments of Playboy Entertainment Group, Inc., CS Docket No. 96-40, at 60-61 (filed Apr. 26, 1996) (citing 141 Cong. Rec. S8166 (statement of Sen. Feinstein)). In addition, Section 504 of the 1996 Act -- which addresses the scrambling of any cable channels not desired by a subscriber -- would be rendered nearly meaningless if Section 505 were construed to apply to channels beyond those primarily dedicated to indecent programming. Accord, Time Warner Comments at 3-4.

or channels offering programs that, while tailored to a specific age or interest group, are not predominantly devoted to sexually-oriented content.[8]

Given that Section 505 was not designed to extend special scrambling or blocking treatment to program services other than those "primarily dedicated to sexually-oriented programming," the Commission would serve the public interest by providing more direction to ensure that the channels targeted by Section 505 are as "clear" to all MVPDs as they are to the agency. Clarifying that the Commission construes the statutory provision to apply only to sexually-oriented program services primarily devoted to indecent programming would comport with Congressional intent and help MVPDs exercise proper judgment in complying with Section 505.

---

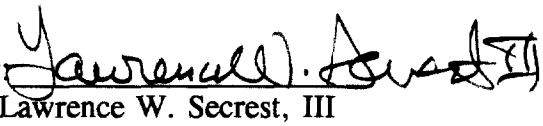
[8] Consequently, it would be wholly unwarranted for the Commission -- or an MVPD attempting to comply with the Commission's rules -- to extend Section 505 scrambling or blocking to a program service simply because it may transmit material that, for example, has been rated "R" by the Motion Picture Association of America. Accord, Time Warner Comments at 3 n.4. The movie rating system has been designed to serve a general informative function for parents, and the "R" rating itself may reflect the presence of various adult themes that may not even be of a sexual nature, much less "indecent." Nor should a programmer's decision to target adult audiences generally be a deciding factor.

CONCLUSION

For the foregoing reasons, Viacom urges the Commission to clarify that Section 505 is inapplicable to program services that are not primarily devoted to "sexually explicit adult programming" or "other indecent" material.

Respectfully submitted,

VIACOM INC.

By: 

Lawrence W. Secrest, III
Wayne D. Johnsen
Rosemary C. Harold

Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

May 24, 1996